



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Right Honble
The Lord Campbell

THE

Midland
Circuit

DIVORCE COURT,

ITS EVILS AND THE REMEDY.

BY

JOHN GEORGE PHILLIMORE.

"Non his juvenis ora parentibus
Infecit osque sanguis Punicum
Pyrrhique et Ingenui occidit
Antiocham, Amibalenque drom."

LONDON:

WILLIAM HENRY BOND, 8, BELL YARD, TEMPLE BAR,
Law Bookseller and Publisher.

1859.

RAYNER AND HODGES, PRINTERS
109, PATTER LANE LONDON.

EB
AP
ZD

THE great and rapidly-increasing scandal occasioned by the proceedings of the Divorce Court must excite the alarm of every one who values the domestic manners of England, and, I might almost add, her reputation among the nations of the world. I do not write these pages with the least expectation that in this age public spirit will be a motive sufficiently powerful to bring about the removal of an evil, however grievous, that is profitable to a very powerful body, and is only of two years' growth ; or that any thing short of absolute necessity, and the loud cry of an indignant people, will induce the legislature to interfere for its extirpation. But I am anxious that at least one voice should be raised from the profession to which I belong to denounce and stigmatize an abuse that has already tainted the purity of social life—that has brought home corruption to our hearths and altars ; and which, if it remains unchecked, must end by dissolving the foundations of national morality.

The subject of marriage is so sacred in the opinion of all but the most frivolous and abject of the species—it is so woven into all the charities of life—it lies so entirely at the root of all that is good and pure in domestic intercourse—it is

the centre round which so many affections group themselves, that any measure which tends to loosen its ties, to make men think more lightly of its obligations, to impair its value, or hazard its desecration, must of necessity alarm every well wisher to his country.

Here it was that the English character was invulnerable;—in other nations it might be said were more dutiful children, more tender parents, kinder relations, more steadfast friends, more agreeable companions;—certain it is, that among our neighbours greater reverence was shown to age, wealth was not worshipped with the same ostentatious dropping-down-deadness of servility; the brutality so constantly mistaken among us for a proof of practical sense was comparatively unknown—mediocrity was less insolent and less successful—*credo equidem*; but all agreed that conjugal fidelity, that the virtues of the sex, the blood and strength of the social frame, were more respected in England, and that in no country was the relation of husband and wife of greater dignity and more hallowed than in our own.

To maintain this part of our national character, which is a compensation for so many deficiencies—to keep this pearl of great price unbartered, is the concern of every man in whose veins there beats a drop of English blood. The moral character of our posterity is involved in the present state of things, and may be affected to the end of time by the continuance of the present system. As the letters carved on the rind of a young tree

3

grow and dilate with it, if matters hold on their present course posterity will read in characters still more conspicuous than we do the signs, already legible enough, of increasing degradation.

Let it not be supposed that I am an advocate for the state of things which existed before the late Act was passed. Far from it. I firmly believe that no civilized country but this would have so long endured such a combination of folly and injustice—nothing could be worse but the remedy. The old evils, bad as they were, did not penetrate to the lower, and hardly to the middle, classes of society. To any man not a stranger to the rudiments of jurisprudence, a senate convened “to release the adulteress from her bond,” a special Act of Parliament passed expressly to enable a particular individual, because he could pay for it, to violate what was declared in the most solemn manner to be the law of God and man, was of course, though quite in keeping with many parts of our legal system, a grievous and humiliating absurdity. Every man not absolutely without the instincts of refinement must have been filled with loathing by the action for criminal conversation ;* and if, to all this, we add the general character of ecclesiastical tribunals through the land, the appointments to which, in spite of some revered exceptions for the most part added to

* Strange to say, this is substantially restored. See the powerful remarks on this subject of Lord St. Leonards in his Handy Book.

the proofs even of episcopal rapacity,—when we reflect, moreover, that notwithstanding the gross abuses, the crying scandal, the numerous promises of redress, all attempts at reformation were successfully resisted by a combination of interested persons from the days of Henry VIII. to those of Queen Victoria, we shall perhaps be of opinion, (though we recollect the “*absque hoc*,” express colour, special traverses and special demurrers), that no stronger proof can be given of the fatal narrowness of mind, the exclusive attention to what are supposed professional interests, and the purblind bigotry which have set their stamp on our jurisprudence, than is furnished by the continuance of such a system.

The faults of the present measure must be in a great measure ascribed to the shabby, dogged, pettifogging and disingenuous opposition by which, down to the very last moment, it was assailed. Every device that episcopal love of power and selfish interest could set in motion, was employed to maim, perplex, delay and baffle a measure which wrenched from bishops a power usurped when it is hard to say whether the impudence of the clergy or superstition of the laity was greatest, and from* proctors a monopoly that made the Ecclesiastical Courts almost the inheritance of a single family. On this point more than on any other the reformation was incomplete. Ecclesiastical tribunals, instead of

* At the price of an enormous compensation, to which they had the same right as the fish which bit off one of Sir Brook Watson's legs had because it lost the other.

being subject to the ordinary rules of law and regarded as Royal Courts, were permitted, to the unspeakable damage of society, to retain an ecclesiastical jurisdiction on matters exclusively connected with civil life.

The result of all this was, that it was necessary to prove adultery always in three, sometimes in four different Courts (one of which Courts was governed by rules of evidence different from the other three), and men of honour* could only obtain a divorce through the medium of the foul and abominable proceeding of an action for criminal conversation, the vindication of which, in the 19th century, by persons who have held high judicial offices, will surprise no one who has read the reports of Meeson and Welsby.

The great obligation which Sir Richard Bethell has conferred upon his country by the measure garbled and mutilated as it was, which he succeeded by extraordinary efforts in carrying, was the deadly blow it levelled at episcopal nepotism. It was the transfer of the appointment of Judges in testamentary matters to the Crown that, in reality, provoked the virulent opposition of the bishops and of Mr. Gladstone—though so monstrous a reason could not decently be insisted upon. What conceivable connection is there among a people not steeped to the lips in superstition, between the functions of a bishop and the distribution of a deceased person's property?

* "On cite l'exemple de l'Angleterre, mais c'est la risée de l'Europe que ces discussions; elles démoraliseraient nos provinces." Napoléon, *Opinions &c.*, par Damas Hinard, vol. 1, p. 366.

In what country but our own, Protestant or Catholic, since the dark ages, would bishops have been allowed to appoint persons wholly destitute of legal education, ignorant of the laws of other countries as well as of their own, as judges in such matters? Yet to this power they clung with such effrontery, with such convulsive tenacity, that to unloose their grasp required the most powerful efforts of one of the greatest lawyers and most admirable speakers that ever adorned the bar or senate of England. Sir Richard Bethell will rank with the D'Agues-seaus and Lamoignons. He combines a thorough knowledge of English law with an ardent desire for its amelioration. Unrivalled for concise and lucid eloquence, which, whether employed in unfolding principles with philosophical accuracy, or in making statements of transparent clearness, or in exposing sophistry with logic unsparing and irresistible, commands the attention of every cultivated audience; he is not less remarkable for luminous and comprehensive views than for deep and various learning. What was said (in the days when England *had* great writers and great men) of Lord Bacon by a great contemporary is true of him:—"He was full of gravity in his speaking; no man ever spake more neatly, more weightily, or suffered less emptiness, less idleness, in what he uttered. His hearers could not cough or look aside from him without loss."

Yet all the energies of such a man were not more than sufficient to accomplish the task he

had undertaken—of taking usurped power from those who of all mankind were least fit to exercise it. The same spirit of ambition, avarice and hypocrisy which, in spite of the grave complaints of Bacon and the burning eloquence of Milton, prolonged with more than Salmoneus* like audacity the use of excommunication, “that precursory judgment of the latter day,” as a means of extorting fees till after the 19th century in England, set every art in motion to prolong yet further the triumph of episcopal presumption over sense and justice, and was within very little of succeeding.

It certainly is curious to observe the arguments of the opponents of the Bill. Mr. Gladstone, who led the opponents of the measure in the House of Commons, is born without the power of distinguishing a sound from an unsound argument, as some persons are born without the sense of smelling.—First, there is the stock objection of too much haste,—yet a little sleep, a little more folding of the hands,—a delay of three centuries was not sufficient for Mr. Gladstone. “There was, surely, no pressing necessity for dealing with the Bill at the present moment.” “There has not † been time to lay before you the ordinary information in the shape of costs and statistics.” Mr. Gladstone, then, had sufficient contempt for the understanding of his audience to quote, as an objection to the Bill, the provision of the clause,

* ————“Divûmque sibi poscebat honorem

“Demens qui nimbos et non imitabile fulmen

“Ære et cornipedum pulsu simularat equorum.”

† Hansard, vol. 147, pages 3 and 4.

which was always inserted in the Bill before the Lords, prohibiting the marriage of the adulterer and the adulteress, and which was, by a proceeding truly characteristic of English jurisprudence, always struck out in the Bill before the Commons. He, then, rebelling not against inference or argument, but against the evidence of the senses, declared that the principle of allowing complete divorce "was the first stage on a road of which we knew nothing." And, if to this we add the fact that Mr. Gladstone, who complained of want of time, and took the high* theological ground in 1857, was a member of the Cabinet in 1854, under which a Bill to the same effect was brought forward, twice read, committed and reported in the House of Lords, and abandoned simply because it was thought desirable that it should be combined with another Bill, entitled "A Bill to transfer the jurisdiction &c.," we may judge of the scrupulous character of the opposition which Sir R. Bethell was obliged to encounter. In the House of Lords the opposition was more preposterous than in the Commons. It was rested on the ground that to allow divorce was against the law of Christ. This being the case, one would have supposed that every Divorce Bill (there was seldom a Session without three) would have encountered, as Catholic Emancipation did, the vigorous and inflexible opposition of all the

* Brantôme tells us that "Save us from the Pater nosters of Monsr. Le Connétable!" was a common exclamation in the days of Charles the Ninth—they were always a prelude to some mischief.

Bishops, One would have supposed that year after year the public would have been scared from its apathy by vehement denunciations from those who watch over the interests of the Church, against such direct transgressions of the law of God, by a body of which they continued to be active members. When the revenues of the Church have been assailed—when an attempt has been made to diminish the number of Protestant Bishops among a Roman Catholic population, or to distribute a larger portion of the vast revenues of the Church among the working clergy—in short, if the secular interest, or power of the Bench, are in the remotest degree affected, there has been seldom any lack of zeal on their part, or any languor in their expostulations. To some persons it has almost seemed as if they were obnoxious to an opposite charge, and as if their zeal for their temporal interests and the public good, from which, as everybody knows, those interests are inseparable, transported them occasionally beyond the limits of their spiritual obligations. But when nothing more than national morality was at stake—when the question is not whether a Bishop shall have five or six thousand pounds a-year, but whether the House of Lords shall, by consenting to a private Act of Parliament, legalize that “which is undeniably* for-

* Bishop of Oxford's speech, Hansard, vol. 147, page 384 and 827. If his lordship will examine the subject with ordinary care he will see that he is mistaken as to the word undeniably.—
“Sub hæc Origines movet aliam questionem an quemadmodum ob

bidden by Our Lord," the Prelates in the House of Lords are silent, torpid, and unresisting. There is an awkward word which may occur to some of my readers as not an improper one to describe this violent contrast—this sudden change from absolute lethargy to a paroxysm of convulsive violence; but I had rather they should apply the word than I. To be sure the power of appointing Judges in every diocese to decide matters of civil right went for nothing in the motives of their opposition. All history, from the days of Gregory Nazianzen downwards, shows the apathy of Bishops on such questions. Horace expresses my feelings, as he does the Saint's—

—————"Quam mihi sæpe
"Bilem sæpe jocum vestri movère tumultus."

An English Protestant, however, cannot reflect with any very great satisfaction on the conduct of Prelates with regard to marriage. It pleased God to make the unutterable wickedness and bestial appetites of Henry VIII. an instrument for establishing the Reformation, but that does not make the subserviency of Cranmer to that scourge of the human race less scandalous. In James I.'s time Bishop Bilson, by consenting to be the pandar to Rochester and to assist in divorcing the Countess of Essex, on a pretence ludicrously false, from her husband, for which he was made a baronet, acquired the name of Sir

adulterium licet uxorem repudiæ, ita propter parricidium, veneficium, aut furtum liceat et hæret hic perplexus K T A."—Erasmus, vol. 6, page 694., Leyden Ed. "Christus a Judæis interrogatum Judæis respondet."—698 *ib.*

11

Nullity Bilson; and forfeited to vice as James the First was, he long refused to make Laud a bishop on account of his infamous conduct in marrying Lady Rich, while her husband was yet alive, to her adulterer Mountjoy, Earl of Devon. Two Bishops certainly voted, and from honest motives, for the divorce of Lord Rous, in Charles II.'s time, but whether we approve or disapprove the conduct of the Bishops on the occasions of which I have spoken—whether we think Bilson and Laud acted the part of honest upright men, or of shameless timeservers—it is certain that Sir R. Bethell spoke the exact truth when he said that the Bill involved only long existing rules and long established principles, and that it was intended only to give a local judicial habitation to doctrines long recognised in our jurisprudence.

Indeed neither Special Pleading as it existed under the New Rules, nor the system of Chancery Procedure before the late reforms, which reflect so much lustre on the genius and patriotism of Sir Richard Bethell, place our ignorance of jurisprudence in a light more deplorable than the whole history of the Ecclesiastical Courts and the laws relating to marriage down to the year 1857. But the particular abuse now considered was almost confined to the opulent. Public opinion was sound and healthy, not debauched by the contagion of incessant example. If it was the object of the cabal who prolonged for so many years the existence of the Diocesan Courts,* and

* In the very last agony of the system, and after the advocates

by which the judicious and comprehensive schemes of Sir Richard Bethell were thwarted with such persevering and malignant industry, to make us regret the change ; were matters to remain as they now are, it might almost be said that they had succeeded. For what is the actual state of things? A deluge of abominations has overspread the face of the land. The scenes before the new tribunal rival, in all that is loathsome, foul and brutal, those of the lowest Police Court. Everything most shocking and offensive in the manners and habits of the coarsest and most sensual classes, all the elements of obscenity, violence, falsehood and malevolence, are there sucked up and gathered together in one pestilential cloud, and thence discharged in fetid torrents on the surface of society. All the fig-leaves of ordinary life are torn away. The best possible public instructor carefully retails to the prurient curiosity of the vulgar, every disgusting proof of moral turpitude, and even of physical degradation. All the garbage and offal, which are the delight of such appetites, are carefully provided for them. The noisome sink is never dry. The columns of the papers often

of it had succeeded in baffling an attempt at reformation, a clergyman was appointed, for the diocese of Chester, to discharge the duties Sir C. Cresswell now fulfils. The appointment was in the gift of the Bishop of Chester, and was worth, I was informed, near 2000*l.* a year. One of these clerical Judges allowed, from sheer ignorance, the preliminary proceedings, in a cause for brawling in the vestry, to be prolonged till they had cost the defendant 400*l.* Then the plaintiff, who had paid 600*l.* for the pleasure of ruining his adversary, allowed the matter to stop.

13

rival the works sold in the back rooms of Holywell Street,—*e. g.*, a sordid hypocrite marries, from avarice, a wretch of filthy habits, virulent passions, advanced age, gross propensities, and hideous exterior, “the wappened widow,”

“Whom the spital house and ulcerous sores
“Would cast the gorge at.”

The natural consequences follow ; all the effusions of two such beings, when their souls are black with rage, ulcerated by disappointment, festering with hate, and maddened by vexation, are published word for word and placed day after day on every breakfast-table in London. Again a woman unsexes herself so completely as to feel morbid excitement in gloating over the accumulated proofs of her own licentiousness. She writes a journal at which Messalina would have started. This, in all its worst details, is carefully disseminated throughout this prosaic, practical and form-admiring nation. In a short time all this will be, as the Newgate Calendar has been, transcribed into some novel, the author of which will be eulogized for “graphic power” and “breadth of colouring,” or “subtle perceptions,” or in any other slang phrases that happen to be the stock vocabulary of the cant of criticism at the time. The husband or the wife indeed

“Fruitur Diis

“Iratis—at tu victrix provincia ploras.”

The national mind is tainted, and it is no exaggeration to say, that every time the Divorce

Court holds its sittings, a blow is given to the social fabric as it now exists among us.

But the appalling evil of the system as it now exists is this,—that any husband and wife who are tired of each other, may get rid of the marriage tie. This is the evil we should shake out like fire from our bosom.

The Act, in the 27th clause, allows the wife to obtain a dissolution of marriage on the ground of adultery, coupled with such cruelty as without adultery would amount to a divorce “*a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.”

What profound ignorance of human nature to suppose that such a cobweb law can be any restraint upon collusion! The fierce and terrible passions of love and hate which you have to deal with, require chains of adamant, and you think to bind them by a web of gossamer. The whirlwinds that have been let loose, and that now sweep in hurricanes over the private state, are not to be imprisoned in such a flimsy bag as this. Who can say to what ill-treatment, to what brutality, to what incessant sufferings, to what a series of tyrannical vexations, a husband may have recourse to compel his wife to be a party to such collusion?

Better would it be by far to allow directly what is allowed in reality—better would it be at once to say that consent on both sides shall entitle married people to a divorce, than to establish such a plain encouragement to prevarica-

tion, and to make courts of justice the instruments for carrying it into effect.

Further than this the evil cannot go—short of this it does not stop. But is it to continue? The man who denies that it exists does not deserve to be reasoned with. The man who admits that it exists, and would allow it to continue, is the advocate of a public grievance—of a lasting taint and blemish on our institutions—of a disease that infects the moral atmosphere around us.

The first remedy I propose for the present state of things is the removal of this part of the law from our Statute Book, and to refuse to women in ordinary cases of adultery, in cases of adultery coupled with cruelty, or in cases of adultery followed by two years desertion, any remedy but that given by the old law of a judicial separation.

Marriage is not a mere personal contract. It has been the fashion to argue this case as if husbands and wives only were concerned; there can be no more fundamental error. Not only has all society a deep interest in every thing which affects the matrimonial contract; but, in the narrowest and most pettifogging view that it is possible to take of the subject, there are other persons whose all is at stake upon its maintenance. Unless we adopt the reasoning of Sir Sampson Legend, in "Love for Love," we must allow that those who bring children into the world have contracted obligations towards them that are sacred and indefeasible. But we

must look further. "*Gratum est*," said the old satirist—

"Quod populo civem patriæque declisti."

Divorce is not the discovery of modern philosophers; it was a primæval injury inflicted by the strong upon the weak, before the importance of the marriage contract to the commonwealth was fully understood.

In* Rome the necessity of giving up the wife's fortune was probably a main reason why divorce for five centuries was unknown. At last it became common; and there can be no doubt that the practice of a kind of marriage, less solemn and guarded by sanctions less awful than that generally known, was a principal cause of its frequency. Christianity changed to a great degree the law upon this subject. Justinian prohibited the divorce by mutual consent, allowing it only for certain reasons, which will be found in the Code, B. 5, tit. 17—24, and Novell. 117, 134, 140. But it may be remarked that the law, as it existed at Rome, as it was enacted by the French law now repealed, and as it exists really, though covered by a specious form of words, in England, allowing divorce by mutual consent, was loudly condemned by the heathen moralists. It was stigmatized as immoral and degrading by public opinion. There is not a poet nor an historian by whom it is not repro-

* Sigonius, 47. "*Si divortium sine culpâ mulieris fiat dotem integram repeti.*"—*Paulus*. "*Si viri culpâ factum est divortium quo liberis manere nihil oportet.*"—*Cic. Topica*.

bated. Tacitus and Juvenal were on this head more rigorous than the theologians who allowed the Landgrave of Hesse to marry again during the life of his first wife, and would have censured the licentiousness to which Laud and Sir Nullity Bilson were the pandars.

I have said that the law as it now exists, opens the gate wide to every kind of immorality. It has all the evils of the old immoral law of the French Revolution, with the additional turpitude of fraud. No view can be more superficial than that of those who claim ~~on~~ behalf of women the right of absolute divorce on such grounds. The right of divorce is a fatal gift to woman; polygamy, and everything that resembles it, makes her the mere slave and vehicle of sensuality. A woman has a deeper interest in the permanence of the marriage contract than a man; it is easier for him to find a second wife, than for her to find a second husband—her beauty fades even while his strength increases—marriage for her is what nothing but a deeply planted instinct could induce her to undergo—it is the harbinger of many a pang and many a ~~peril~~, the beginning of a circle of events followed by consequences burdensome and lasting. She never can be restored to her virgin honours,

“Neque amissos colores

“Lana refert medicata fuco.”

or, as our great Dryden said—

“Marriage, though it sullies not, it dyes.”

We are so constituted that the same argument

does not apply to man. Therefore, a woman has a right to ask that the contract shall be lifelong ; that she shall be guarded against her own caprice, as well as against the perfidy of him to whom she has entrusted all that is dear and precious to her on this side the grave. Therefore, she has a right to ask that the same solicitude which is shewn to her pecuniary interests shall be extended towards those which are of greater magnitude. That as, in most instances, she is not allowed to give up her own and her children's fortune to feed her husband's or her own extravagance, she shall not be allowed, when irritated by neglect, or bewildered by vanity, to give up her own and her children's honour to gratify his or her desire of change.* That the legislature should exert whatever influence it has upon manners to prevent the thought of such an event from casting a shadow over her mind, or ruffling the serenity of domestic confidence. For whatever fortifies marriage, dignifies and exalts the condition of woman ; and whatever tends to polygamy, in any shape, debases it. And though, in the case of an individual, it may be hard that she cannot find a new protector and a peaceful home, the sex are gainers by the restraint ; it is beyond all doubt their interest that no man should be able, by a series of unjust and tyrannical actions, to compel his wife to assist him in escaping from the marriage tie.

* Napoleon saw this—"Il ne faut pas que les époux du moment où ils s'unissent prévoient qu'il existe pour eux un moyen de rompre leurs liens"—*Opinions et Jugemens de Napoléon*, vol. 1, p. 362.

"Whatever hypocrites austere*ly talk,*"

every consideration of justice and social welfare militates against the doctrine too ridiculous to be really acted upon, that the same cause which gives the husband, gives the wife the right to a divorce. The voice of reason and the plainest instinct of nature cry aloud against such a doctrine. As well might it be said that antenuptial irregularities in man and woman are offences of the same kind,—that the Adventures of Tom Jones might be transferred to Sophia Western without detriment to the interest of the story; or to take an example more ancient, and from one who had read the human heart even more deeply, "whom," as Milton says, "I dare be bold to think a better teacher than Scotus or Aquinas," that if Penelope had yielded to one of her suitors as Ulysses did to Circe,—the fascination which rivets every man of common sensibility to the Odyssey would be the same. The wife who overlooks such transgressions in her husband is amiable; the husband who overlooks them in his wife is infamous. Such is the language of jurists, moralists and statesmen, and for the legislature to hold any other would expose the country to the ridicule of the world. Assuming then that the general happiness of the married life depends on its indissolubility; that, however the rule may operate harshly in particular cases, women, as the weaker party to the contract, have the deepest interest in its maintenance; and that, instead of giving divorce to the poor, it would be for their

advantage that it should be withheld from the rich, the corollary follows, that if divorce ever is to be granted it ought to be granted on one ground only, the adultery of the wife. And that the present law, which grants a divorce to the wife for the adultery of the husband accompanied with desertion (which is another form of saying that a man and his wife may be divorced whenever they are tired of each other), should be abolished.

2ndly. The next measure, without which all attempts to prevent collusive proceedings will be impotent, is the appointment of a responsible public officer to fulfil the functions of the *avocat du roi*, in France, to watch over the proceedings of the parties to such a suit—to sift and examine closely the grounds and motives of their conduct—to do that, in short, for the Court which it is impossible the Court should do for itself, and to lay before it the result of his investigations.*

3rdly. The Court ought to consist of three Judges, who should decide without the intervention of a jury. With regard to the gentleman who actually fills the office of Judge, I do not mean to offend when I say that Sir C. Cresswell is perhaps not the person best qualified for the power akin to arbitrary, and the functions almost legislative, which he has been selected to exercise. He has the "*usus unæ rei deditus*," a clear though narrow understanding, the acuteness acquired by great practice and long experience, and is thoroughly versed in

* This proposal has the high sanction of Lord Brougham's authority.

21

English Law. He neither is, nor pretends to be, a jurist ; and his judicious friends will not insist upon capacious thought, an enlarged range of study, indifference to the accidents of social position, or simplicity of manner, as among his leading characteristics. He is the growth of that technical school to which law Reformers are indebted, as the patriots of Charles II.'s time were to May and Chiffinch and the Duchess of Cleveland, for aggravating the evils of the system which they supported till they became so flagrant that they were swept away. His faculties are all tinged with this hue. He is an exact illustration of what Mr. Burke said of Mr. Grenville, that such habits are apt to make people think the substance of business less important than the forms in which it is conducted, and that when there is no precedent on the file, greater knowledge of mankind and a far more extensive comprehension of things is requisite than they are likely to possess. Uncontrouled authority is good for no man, and, after a Bishop, a Judge is perhaps the person who ought least to be trusted with it. Three Judges ensure unanimity, or a majority of two to one. That such a tribunal for the causes that come before the Divorce Court (which is the only part of the questions I am now dealing with) would be far more satisfactory, and far less liable to be swayed by any improper bias, than the tribunal, acting through a jury, as it now exists, will, I think, be manifest to all who consider the subject with attention.

In cases where the passions of men not accustomed to rhetorical display may easily be roused, if juries are employed a trial is a lottery in which the chances are strongly against the right. An advocate who will condescend to appeal to any prevailing prejudice or epidemical illusion, who will, in Lord Clarendon's words, "lower the dignity of his profession by a cheap and vile affectation of popular applause," has a very great advantage over one who is more fastidious. The great danger of a judge in all criminal and many civil cases is that he will have too much predilection for the classes above, and too little sympathy with those below him. Till human nature is altered such tendencies will perpetually discover themselves in spite of all precautions, so long as it is possible for a learned lawyer to be a vulgar upstart.

Against this evil juries furnish a great security; and, besides that the duties imposed on jurors do to a certain extent furnish the means of national education (sometimes paid for by the ruin of a suitor), the institution has this inestimable advantage, that it removes one great cause of national discontent, by giving the people confidence in the administration of justice. If the law is the work of the aristocracy—conviction is the act of the people. If they choose to betray the fortress which the constitution has appointed them to defend, none are so much to blame as themselves. But cases which are brought before a Divorce Court are of a character

which make any bias on the part of a judge, generally speaking, most improbable, there is to be sure the partiality of sex; but as nobody has suggested, not even Mr. Gladstone as yet, whatever he may do, that the tribunal should consist of men and women, this inconvenience must be endured. Even if any sinister interest should happen to sway a single judge, if the suggestion I make is adopted, and the tribunal enlarged, it can hardly extend to his associates. In the cases before the Divorce Court a jury either agree or differ from a judge—if they take their view from the judge, he delivers the verdict without responsibility—if they differ, the great probability is, in a case of the nature we are now considering, that they are mistaken and perverse, and have been made the instrument of gross injustice. The deliberate sentence of three judges trained in the habits which qualify men to judge of evidence—or their guard against inflammatory appeals and not likely to be swayed by the dexterity of an advocate—without any conceivable motive to go wrong, would have far more weight with all whose opinion is of any value than that of the tribunal as it is now constituted. How can it be supposed that the way to attain authentic decisions, *i. e.*, to settle the jurisprudence on such subjects, is to substitute an everchanging for a permanent tribunal, or to commit the decision of a case to persons promiscuously, and perhaps for the first time, taken from the body of the people, rather than to men who hav

made judicial investigation the business of their lives? It is a miserable perversion of ideas to give such cases, adjusting the most delicate relations of social life, involving the gravest questions of law and morality, and leading to the most important results, to the Euripus of a jury. It would be as wise to set about making a watch with the tools of a common carpenter. The tribunal should consist of three permanent judges, and from their decision there should be only one appeal.

4thly. The next consideration, though apparently matter of detail, is of great importance. It relates to the manner in which notice should be given to the persons interested in such suits. It is clear that, to prevent fraud, the greatest strictness on this head is essential. This is precisely a point on which the eye of a jurist would be fixed at once. It has, therefore, wholly escaped the notice of our legislature. As the practice is now regulated, no care or solicitude on the part of the Court can prevent gross and constant prevarication. The duty of serving notices should be confided to sworn officers or apparitors of the Court, and any violation of duty on their part should be guarded against by very severe penalties.

5thly. Another alteration in the law, as essential as any that I have ventured to point out, supposing of course that to prevent adulterous intercourse is the object of the legislature, is to make the marriage of the divorced adulteress with the adulterer unlawful. That to enable

25

the guilty parties to carry their purpose into effect is not the way to prevent crime, seems sufficiently clear. That no one should be the better for his own wrong, is a fundamental principle of jurisprudence in countries where the word principle, as applied to law, has an intelligible signification. To keep holy the marriage tie was one of the main objects for which society (I do not speak of society as modified by Christianity) was instituted.

"Oppida cæperunt munire et condere leges

"Neu quis fur esset, neu quis latro, neu quis adulter."

The more strict and inseparable, therefore, the association of shame and disaster is with guilt, the more likely it is that the end of society will be attained ; and it is not whimpering about the hardship of individual cases that can exonerate the legislator from his duty.

The simple question is, what general rule will most conduce to the public welfare ; but the word rule and the word general are unknown in our jurisprudence, which is a mass of exceptions and anomalies, as the work of comparatively uneducated men was sure to be. Neither is it an answer to say that, when the passions are kindled and the blood burns, such considerations are of little value. Before matters have reached that point it is that such considerations are of value. It is important that a seducer should not be able to gild the turpitude of his purposes—that he should not be able to hold out the prospect of a

happier home and more devoted affection to his intended victim—that she, who sees her husband in his hour of vexation and infirmity, and

“When he is seen least wise,”

should not allow herself to form prospects of change, and to institute comparisons between him and one who has the advantage of novelty. That the scheme should be stripped of all the gloss and illusion by which a passion, too gross to be named, becomes “gentle love,” and “charms fair womankind.” And that a woman should at once see that the simple proposal to which she is asked to listen, is that, to gratify the sensuality of a man who calls himself her lover, she should steep herself in infamy without the possibility of extrication. At present there is no obligation so sacred in the eyes of a man of honour, as that which binds him to marry the woman who has sacrificed everything for his sake—in many cases the prospect of such a union is a powerful motive to the crime ; in all it must be pretended. But if the law is altered as I propose, the offence will be seen, however specious and dazzling its original shape, in its naked deformity, and the man of gallantry will appear to every woman of common refinement, not absolutely infatuated, like Proteus at last, in the shape of a hog. For one that incurs the punishment hundreds will be saved by the example.

I own that the scenes of the Divorce Court have converted me to the doctrine that neither of

the parties contracting a marriage should be allowed to marry again *during the life* of the other, and that the relief given by the Courts should stop at a separation from bed and board. I believe that if no divorce had ever been granted in this country, there would have been far less crime and misery arising from conjugal infidelity and ill-assorted marriages than has existed among us. I believe that if such a law could be once established, and guarded against that exceptional legislation which is the leprosy of what the poverty of our language obliges me to call English jurisprudence, the effect would be beneficial. But I do not believe that "*in fœce Romuli*," any such law can be passed, and I am quite certain that, if it did pass, under the system of expounding law which prevails among us, and is as flourishing now as it was when the Judges made the Statute of Uses a dead letter, it would speedily be frittered away. Therefore I do not lay any stress upon this suggestion. I want to get rid of a false system, a pestilent scandal, and an intolerable mischief.

Without desiring to bring back women

"—— al fuso ed al pennechio,"

an observer of social progress will see, that if the Greeks* erred in refusing women their proper influence within a legitimate sphere, modern Europe has erred in extending their power to relations

* Still the most touching descriptions of conjugal love are to be found in the 6th Book of the Iliad and the Alcestis,—the Greeks are our masters turn where we will.

from which it should be excluded. We have taken them from their houses, set them on a stage and made them artificial creatures, to be seen by the glare of the footlamps. Instead of the pleasing unostentatious duties which reason has allotted for their province, they are become the channels of social importance, and too often of political intrigue. We have made them restless and ambitious;* and as the ambition of a woman must always be limited to a narrow sphere, and have recourse to petty artifices, we have hardened and at the same time contracted their moral and intellectual nature. We have given them an ascendancy they never were meant to possess, and we compensate for this irrational indulgence by scourging the vices we have pampered with a rod of scorpions. The true place for women to occupy is that which was filled by the Roman matron during the flourishing period of the Commonwealth—as within certain limits their sweet and cheerful influence is not only salutary, but essential to the purity, refinement and happiness of mankind, beyond those limits it is an active poison, corrupting themselves and corrupting all around them. I might quote Louisa of Savoy, The Duchess of Valentinois, Anne of Austria, and a hundred others. But I take Madame de Maintenon. She was a woman above the common frivolities of her sex. Her letters show a masculine penetrating reason. But nobody can doubt that she was the bane of France. The per-

* “Elles (les femmes) ont trop d'autorité”.—Napoléon, 1, 352.

nicious influence of women on society was one main cause which led to the frightfully dissolute state of France during the reign of Louis XV. When it had reached its point of culmination, society was never (in modern times at least) so corrupt, and women never were so powerful: — “J’entendis,” says Montesquieu,* “un jour une femme qui disait, il faut que l’on fasse quelque chose pour ce jeune colonel, sa valeur m’est connue, j’en parlerai au ministre,— une autre disait il est surprenant que ce jeune abbé ait été oublié, il faut qu’il soit évêque—il est homme de naissance et je pourrais répondre de ses mœurs.” “Celui qui est à la cour, à Paris, dans les provinces, qui voit agir des magistrats, des ministres, des prélats, s’il ne connaît les femmes qui le gouvernement est comme un homme qui voit bien une machine qui joue mais qui n’en connaît point les ressorts.” Contrast this description with the exquisite picture drawn by Dante of the life of his ancestors:—

“ L’una vegghiava a studio della culla
E consolando usava l’ idioma
Che pria le padri e le madri trastulla.

“ L’altra traendo alla rocca la chioma
Favoleggiava con la sua famiglia
De Trojani, è di Fiesole, è di Roma.

“ A così riposato, a così bello
Viver di cittadini—a così fida
Cittadinanza—a così dolce ostello.

“ Maria mi dié.”†

* *Lettres Persanes*, 109.

† *Paradiso*, c. 15.

In which description shall we look for the Lady Jane Greys, the Lady Crokes, the Mrs. Hutchinsons, the Lady Russells; for the mothers of the Elliots, the Hampdens and the Sidneys? From which class would any man select his wife who wanted a comforter and a companion, or who desired that his children should be trained, not to be jockeys or gamekeepers or coxcombs, or railway jobbers or collectors of shellfish, but to be just, skilful and magnanimous, "fit to serve their country in peace or war;" and it is, except in a few rare instances, it is for companions and comforters, for wives and mothers that women are intended, not for professors nor politicians, nor mathematicians, nor critics, nor theologians, nor to hold "bureaux d'esprit," nor to be flattered by men of letters, nor to be fine ladies; which, being interpreted in * England, means models of caprice and insolence, standards without which no one could tell how far human impertinence and vanity could reach.

I trust that I shall not be supposed, in anything I have said, to mean what is inconsistent with the veneration and gratitude I feel, in common I believe with the vast majority of my countrymen, for the Lady who now wields the English sceptre, and who combines the virtues which are lovely in private life, with the great qualities of a Constitutional Sovereign. Hers is, of course,

* St. Evremont says, of the Duchess of Mazarin, that the lowest person in her company felt himself at ease,—that was the great lady of the old régime.

an excepted case, requiring peculiar gifts, a peculiar education, and a peculiar government. To point out how fortunately all these elements have been mixed together in the example of Queen Victoria would expose me to the charge I most abhor—that of flattery ; but it is a topic to which our children's children will listen with delight, if indeed they are not what there is too much reason to fear they may become ; for the signs of fast augmenting intellectual decrepitude, in every branch of human inquiry that does not immediately tend to the increase of material enjoyment, are as plainly to be seen in England of the present day as they were in the Lower Empire. If we quit that sphere, the sphere of business, our exertions are ludicrous. The House of Commons dwindles every day more and more into a vestry, which discusses such topics as the right of picking up chestnuts in Bushy Park. They were two nights debating, on the Act I am considering, whether the registry should be at Leeds or Wakefield, and not so many hours whether women should be allowed divorce for the reasons assigned in the 27th section? If the affairs of India had occupied them half as much as the question how they were to be conveyed to the Naval Review, when every Bench was crowded, or as the disturbance in Hyde Park, the annexation of Oude would have been prevented, the rebellion of India never would have taken place, the immense waste of blood and treasure would

have been spared, the rapacious perfidy which has left so deep a stain on the English name, the massacres, and the cruelties in retaliation for those massacres, would not have disgraced our history. No one in such a state of things can wonder* that the case of the *Charles et Georges*, the greatest insult offered to England since Louis XIV. proclaimed the Pretender King of Great Britain, has up to this moment been unnoticed. Our Courts of Justice are occupied by wretched clerical disputes, by miserable arguments about intoning, or about the childish ceremonies and fantastic tricks which excite the jaded senses, and stimulate the languid superstition of the fashionable herd, and which are fast becoming the substitutes for the pure and rational worship which our fathers won for us at the stake and in the battle field, and of which Chillingworth, Tillotson, Clarke and Butler were fitting guardians, as the modern champions of Convocation are of the mongrel counterfeit, by which it is sought to be superseded. What the Greeks, in their admirable language, called in one word, *ἀνεπισκεψία*—obtuseness to all that is beautiful or becoming—is the atmosphere we breathe. It pervades every page you read, every sight you see, and every

* This was written before the debate on the 8th March, which does not alter my opinion. Fifty years ago such an event would have set the nation in a flame; now we think of railway stock, and propagating fish—"Hæc fierent si" &c.?

sound you hear. Biographies are published of persons, compared with whom P. P., clerk of our parish, was a person of great importance. The most trivial, affected and offensive slang distinguishes our current literature. The language of Shakspeare* and Raleigh and of the translators of the Bible, has become that of Carlyle and Tennyson. Deans write histories in a style which would have made Addison and Smalridge fly their country.—“Primi omnium eloquentiam perdidimus.” And we have made

“One mighty Dunciad of the land.”

Collectively renowned, we are individually contemptible. We jog and grovel on, but if ever we lift up our eyes we shall see that we are in Samaria. All this is inevitable where, in matters of taste, the many guide the few, instead of the few guiding the many. Where literature is a trade, nothing that does not hit the sense of the majority—nothing but the most servile condescension to the judgment of the great vulgar and the small—can make it answer.

They who live to please, must please to live. Let us not deceive ourselves. The age of individual grandeur has passed away. All the cramming in the world will never give us a Bar-

* ————— “those mighty spirits
Lie raked up with their ashes in their urns,
And not a spark of their eternal fire
Glows in a present bosom——”

row, nor a Bacon, nor a Bolingbroke, no, nor an Atterbury. It will give us seas and lands full of crack tutors and senior wranglers, of wretched mannerists aspiring to eccentricity in verse and prose, of pert secretaries to commissions for extirpating whatever classical taste is left among us, of historians (save the mark!) who shew their good sense, good feeling and good taste by defending Henry the Eighth, and flippant writers of articles. The dwarf may climb on the giant's shoulders, but his brain and heart will always be a dwarf's. Yet, while we bow down to this humiliating destiny, although we have lost the commanding energies, let us keep the lowly virtues; and, if we must cease to be great, let us at least endeavour to be respectable.

THE END.

EB APM ZDd
Divorce court :

Stanford Law Library



3 6105 044 330 624

DEMCO
PAMPHLET BINDER
Lithomount